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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF
AMERICA

Petition for Rehearing

IN THE

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No. 24

GULF STATES STEEL COMPANY
and
NATIONAL SURETY COMPANY,
Petitioners,
v.
THE UNITED STATES OF AMERICA

PETITION FOR REHEARING

The above named petitioners come now and respectfully petition this Honorable Court for a rehearing of said cause, and for a stay of the mandate pending such rehearing, for the following reasons, to-wit:

1. The Court concluded in its opinion (page 8) that the obligation of the bond sued upon contemplated the same protection to the Government afforded by the first bond given. This conclusion does not take into account the difference in wording of the two bonds. The first bond indemnified the Collector against all loss, etc., "to which he may be put by reason of having allowed the said Gulf States Steel Company to withhold the payment to him, as such Collector" of the tax assessed. The bond sued on, which was in a larger amount than the first bond, obligated the petitioners, one of which (the National Surety Company) was not a party to the first bond, to pay so much of the tax "as is not abated." Had the suit been upon the first bond, presumably the obligors on that bond could have interposed the defense that there had never been any liability on the merits for the tax claimed and if the defense had been proven it would have been established that the Collector had suffered no damage from the delay. It would seem clear that a collector who is prevented from collecting a tax that was never due because of delay has suffered no damage. This very valuable defense is not available on the bond sued on. The sole defense permitted by that bond was an abatement of the tax. Unless the tax had been abated, irrespective of the validity or correctness of the assessment, the obligors on this bond were liable. It is submitted that two bonds admitting of such different defenses could not mean one and the same thing.

2. The Court apparently concluded that the

petitioners rested their contention that the tax had been abated by the decision of the United States Board of Tax Appeals solely on Section 906(e) of the Revenue Act of 1924 as amended by the Acts of 1926 and 1928, and as that Section did not become law until after the bond was given, the abatement referred to in the bond "depended upon the future decision of the Commissioner" (opinion, page 8-9). In this respect the Court seems to have misapprehended or overlooked the petitioners' argument as presented at pages 11-13 of their brief. Section 906(e) prescribed that the effect of a decision on limitation was equivalent to a decision on the merits and was cited as the construction Congress put on the effect of such a decision, when it had not materially changed the power given to the Board in 1924 to reconsider the Commissioner's final determinations of tax liability. Ignoring this Section, however, the Board was created in 1924 by the Act of that year. It was in existence when the bond sued upon was given in 1925. That bond was in the exact language of section 279(a) of the Revenue Act then in effect, which characterized a decision by the Board of no deficiency as an abatement of the tax and presumably was given with that provision in mind. The Board was created to redetermine deficiencies thereafter finally determined by the Commissioner. There has never been any question but that the deficiency for 1917 was not finally determined by the Commissioner until May 12, 1926. From the outset the Board had redetermined deficiencies on the ground of the Statute of Limitations raised in

the Board. See *National Refining Co. v. Commissioner,* 1 B. T. A. 236, decided December 23, 1924, almost one year before the bond sued on in this cause was given. In the above case the Board said at page 239:

> "There is no more cause to prevent it pleading Section 277(a) (2) of the Revenue Act of 1924 as a reason why a deficiency should not be determined against it than there is to deny it the right to plead any other section of the Act."

The Board had likewise redetermined taxes assessed before the Board was created where the final determination was made after the Act took effect. *Appeal of Mitchel,* 1 B. T. A. 143, decided Dec. 11, 1924; *Appeal of Boston Structural Steel Co.,* 1 B. T. A. 602, decided Feb. 17, 1925. See also Note 7 to opinion of this Court in *Brown & Sons Co. v. Burnett,* 282 U. S. 283, 289.

It is submitted that in view of these facts the parties did not intend to waive their right to have the tax liability determined by the Board or to place its final determination in the hands of the Commissioner. Neither the bond nor any other document restricted the abatement of the tax to action by the Commissioner. Neither is the bond restricted to abatement on the merits. An abatement is all that is required. It is conceded that the decision of the Board prevented any collection of the tax as such. Irrespective of Section 906(e) of the 1924 Act as amended, or of Section 279(a) of the 1924 Act, the effect of this decision would seem

to constitute an abatement of the tax under the well-recognized definition of that term known to the parties when the bond was given. In substance, the only definition then known to the term in tax law is found in Funk & Wagnall's New Standard Dictionary and is set out in petitioners' brief at page 11, as follows: "To remit all or part of, as a tax." The word "remit" is defined as "to refrain from exacting." It is admitted that the Government was required by the decision of the Board to refrain from exacting and did refrain from exacting the tax. If this decision abated the tax, the bond, which obligated the petitioners to pay so much as was not abated, became of no effect, in accordance with its exact terms. The tax payer neither sought to prevent nor did prevent the Board from determining the controversy on the merits. It merely set up two defenses allowed by the Act, and the decision on limitations was the choice of the Board and not of the tax payer. It was the Tax Board's election over which the tax payer had no control.

3. The Court did not discuss the general powers of the Board over assessments or determinations of tax liability, but seems to hold that the Board can render a flexible decree, just as a court of equity. It is stated in the opinion, page 9:

> "The effective scope of the decision rendered is no broader than the issue, opinion and findings."

Petitioners contend that the Board cannot render a flexible decree. It has one and only one func-

tion under the Statute: to allow or disallow the Commissioner's final determination of tax liability, and a disallowance of a tax which has been assessed is an abatement.

Your petitioners pray, therefore, that an order be made for a rehearing of the argument in this case, on a day to be appointed by this court, at the present term, and upon such points as the Court may direct.

Respectfully submitted,

JOHN W. DRYE, JR.,
Counsel for Petitioners.

JOHN M. PERRY
AUGUSTUS BENNERS
of Counsel.

CERTIFICATE OF COUNSEL

I, John W. Drye, Jr., counsel for the above named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

JOHN W. DRYE, JR.